Interpreting Islam in the Constitution: Question of Fact or of Law?

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Under Malaysia's federalism, the legislative powers of the Federation are distributed between the federal and state governments by the Federal Constitution, classified under Federal List, State List and Joint List. Thus state legislature is authorised to legislate on matters involving, among others, Islamic law. This power includes to create "offences against the precepts of Islam".¹ So two questions then arise. Firstly, what constitutes the "precepts of Islam"? Secondly, who shall interpret what that phrase means? The first question is decisive to the determination of whether laws enacted by the state government are constitutional. The second question reveals a more subtle issue at work, for it questions the very locus of interpretive authority, and shows the delicate balance the judiciary needs to make between constitutional supremacy and religious autonomy.

The landmark case is *Sulaiman Takrib v Kerajaan Negeri Terengganu* (2009).² In *Sulaiman Takrib*, the Federal Court heard an application to declare an enactment by a state legislature void for being un-constitutional.³ In particular, the petitioner claimed that the enactment—under which the teachings of one "Ayah Pin" were criminalised—had gone beyond the power allowed under the constitution because the phrase "precepts of Islam" is restricted to the five pillars of Islam. Consequently, state legislature, it was claimed, was not authorised to legislate on the subject matter.

In determining whether or not the subject matter of the enactment fell within the rubric of "precepts of Islam", the court deemed it necessary to interpret what in the first place this phrase means. Yet instead of exercising its own interpretation, the court called on court experts consisting of leading scholars of Islamic law to offer their opinion.

Now under the applicable law of evidence, only "relevant" evidence can be admissible in court.⁴ Opinion evidence (i.e. opinions of third parties not directly related to the case) is not admissible for want of relevance except in two circumstances, i.e. when the evidence of witness' opinion is either inevitable or desirable.⁵ Such exception is thus provided in the Evidence Act 1950, section 45 which stipulates that opinion evidence is deemed "relevant" when the court needs information to understand the facts of the case.⁶ However—and this is the crucial point—such experts are only to be called on to decide on questions of

facts, not of law, which is the province of the judge.⁷ This is further made clear in the Rules of Court 2012 (then 1980), order 40, rule 1(1) which states that such experts are only “to inquire and report upon any question of fact or opinion not involving questions of law or of construction”.

In sharp contrast, in the *Sulaiman Takrib* case, the experts were invited to interpret the meaning of the phrase “precepts of Islam” which is used *in the constitution itself*. Is this not an interpretation of the law par excellence? To be clear, the court distinguished between *what* constitutes the precepts of Islam and *whether* the subject matter of the said enactment concerned the precepts of Islam, lending the impression of due observance to the fact-law distinction. Yet the distinction can be more accurately construed as that between law and the application of the law, not between fact and law.

Oddly enough, in *Abdul Kahar bin Ahmad v Kerajaan Negeri Selangor & Ors*⁸, the Federal Court held that the Syariah court had no power to interpret the term “precepts of Islam” and “State law could not possibly confer such power because (a) the ascertainment of Islamic law and other personal laws for purposes of federal law is a federal matter; (b) any question whether law is made by a state is within the power of a state; and (c) interpretation of the Federal Constitution is a matter for the High Court.”⁹ In effect, the court in *Abdul Kahar* denied Syariah court jurisdiction on the ground that the latter lacks competence to deal with the subject matter. Thus having claimed that it is the civil court rather than Syariah court that has competence in the subject, one of the judges in *Sulaiman Takrib*, Zaki Azmi PCA, observed that “This court is not an expert in Islamic law. It therefore has to rely on opinions given by experts in this field.”¹⁰

By the court’s own admission, the interpretation of the phrase amounts to constitutional interpretation:

“It was argued that the offences created by the impugned sections are not offences against the precepts of Islam...So, the question is what is the meaning of the words ‘precepts of Islam’ as used in the Constitution. It is important to remember that *this court is interpreting the Constitution...*”¹¹

Interpretation of the constitution, which is interpretation of the law par excellence, has been understood in the case of *Sulaiman Takrib* to be a question of fact requiring knowledge and expertise in Islamic law. The case has been cited with approval in subsequent cases, such as *Fathul Bari v Majlis Agama Islam Negeri Sembilan*.¹²

The *Sulaiman Takrib* case offers a concrete illustration of how a legal-constitutional question morphs into a “religious” one, with the direct implication that the court concedes lack of knowledge, competence and expertise necessitating

expert opinions. The point is pivotal given the popularity of such ‘Shariah as a source of law’ clauses across the Muslim world, which may invite the same implications.

The case is also important because in Malaysia Islamic law is recognised as the law of the land and is applicable within certain limitations. Comparing the cases of *Abdul Kahar* and *Sulaiman Takrib*, it seems ironic that the court in the former denied jurisdiction to Syariah courts even when the matter pertains to Islamic law, only to concede in the latter that the court lacks competence to deal with Islamic law.

The Malaysian experience is significant in a number of respects. In some Muslim countries with a pluralistic population, the rights of minorities are insufficiently recognised in the constitution; thus, whereas the Muslim-majority seeks to preserve the status quo, the non-Muslim minorities insist on constitutional reform or amendment to safeguard their rights.¹³ In Malaysia by contrast, it is the minorities themselves who stridently hold on to the constitution, even as some segments of the Muslim-majority population call for amendment or reform of the constitution. In 2012, a leader of an Islamic party reportedly called for an amendment to the Federal Constitution for the word “religion” to be changed to *al-din*, the Arabic for “religion”, on the grounds that the English word inadequately captures the meaning of “religion” as a way of life in Islam.¹⁴

Such an episode, along with the aforementioned case, highlights the role of the judiciary in delimiting the boundaries of constitutional supremacy and religious autonomy.

Notes

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1. Federal Constitution, Ninth Schedule, List II—State List, Item 1
2. *Sulaiman bin Takrib v Kerajaan Negeri Terengganu (Kerajaan Malaysia, intervener) and other applications* [2009] 6 MLJ 354
3. Pursuant to Articles 4(3) of the Federal Constitution
4. Evidence Act 1950, section 5
5. Mohd Akram Shair Mohamed, “Evidence” in Asghar Ali Mohamed (ed.), *Malaysian Legal System* (Kuala Lumpur: CLJ Publication, 2014), 635.
6. Section 45 (1), Evidence Act 1950 (Act 56) reads, “When the court has to form an opinion upon a point of foreign law or of science or art, or as to identity or genuineness of handwriting or finger impressions, the opinions upon that point of persons specially skilled in that foreign law, science or art, or in questions as to identity or genuineness of handwriting or finger impressions, are *relevant facts*.” (emphasis added)

7. A court expert in the case argued that since violating a *fatwa* is not an offence against the precepts of Islam, the enactment was therefore un-constitutional to which the court responded. “With respect, these are matters for this court to decide and not for him.”
8. *Abdul Kahar bin Ahmad v Kerajaan Negeri Selangor & Ors* [2009] 6 MLJ 863.
9. Rosli Dhalan & Fawza Sabila Faudzi, “The Position of the Syariah Court in Malaysian Legal System” in G25 Malaysia, *Breaking the Silence: Voices of Moderation – Islam in a Constitutional Democracy* (Kuala Lumpur: Marshall Cavendish, 2016), 111.
10. *Sulaiman bin Takrib*, at 384
11. *Ibid.*, 371. (emphasis added)
12. *Fathul Bari bin Mat Jahya & Anor v Majlis Agama Islam Negeri Sembilan & Anor* [2012] 4 CLJ 717
13. A case in point is Article 66 of Turkey’s 1982 Constitution, which identifies all citizens as “Turks”, thereby courting the displeasure of some Kurdish minorities who, among others, perceived it as an attempt to impose upon them the Turkish ethnic identity. See Mustafa Akyol, “Are All ‘Turks’ Really Turks?”, <http://www.al-monitor.com/pulse/originals/2013/01/turkey-kurdish-minorities-rights.html>
14. Zulkiflee Bakar, “Hadis rhetoric of amending the constitution”, Utusan Online, 07-05-2012, http://www1.utusan.com.my/utusan/special.asp?pr=theMessenger&y=2012&dt=0507&pub=theMessenger&sec=Features&pg=fe_01.htm; Loh Foon Fong, “MCA rejects PAS ‘addin’ move”, The Star Online, 9 May 2012, <http://www.thestar.com.my/news/nation/2012/05/09/mca-rejects-pas-addin-move/>